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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 401

DISTRICT OF COLUMBIA, *Petitioner,*

v.

BANK OF COMMERCE AND SAVINGS, ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF IN OPPOSITION.

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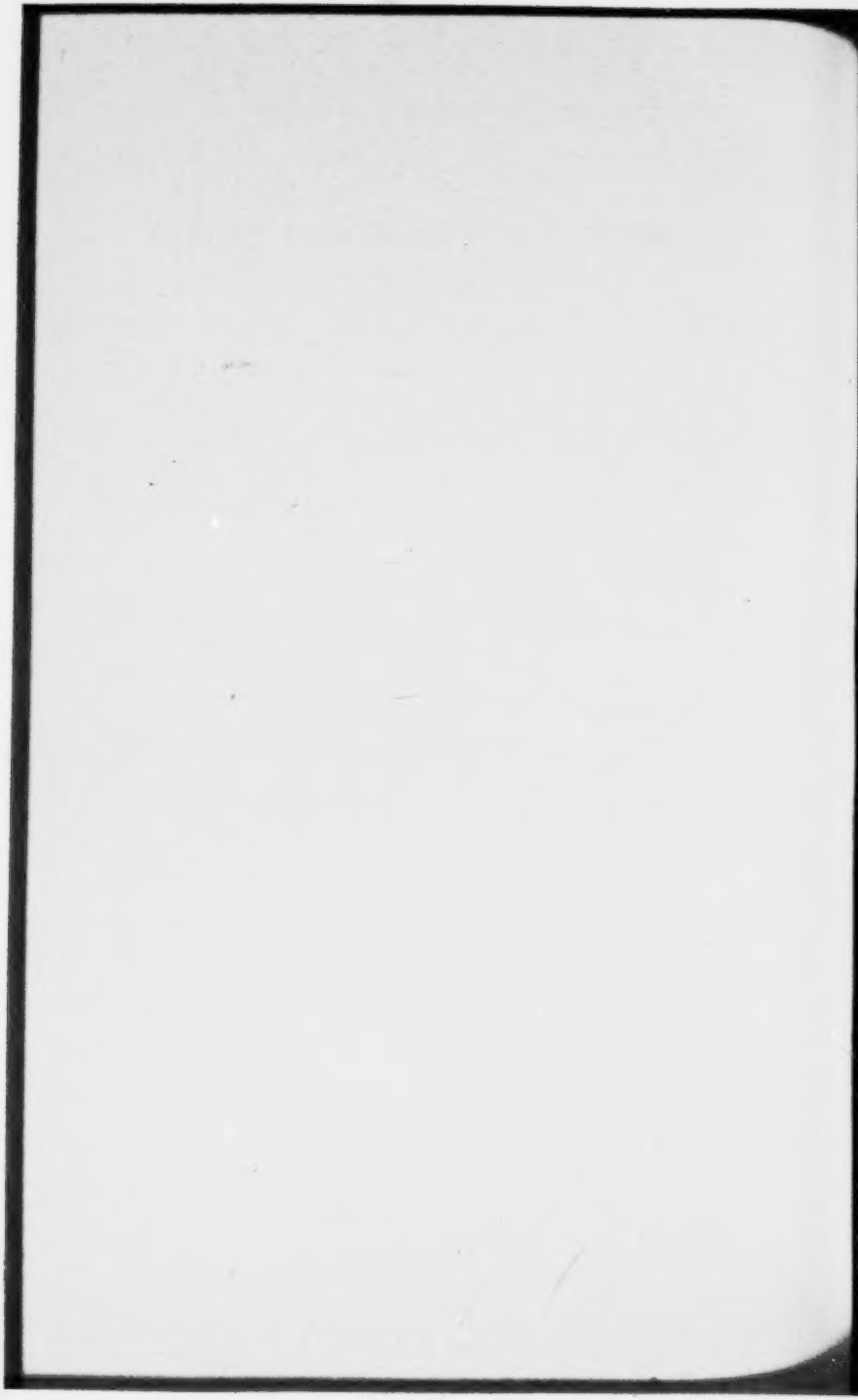

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF IN OPPOSITION.[1]

OPINIONS BELOW.

The opinion of the Court of Appeals (R. 476-483) is not reported as yet. The findings of fact, conclusions of law,

[1] The brief is jointly filed on behalf of the Bank of Commerce and Savings, The Security Savings & Commercial Bank, The City Bank of Washington, McLachlen Banking Corporation, Anacostia National Bank of Washington, and Industrial Bank of Washington, Inc., but not on behalf of the other respondent, The Citizens' Bank of Washington.

and opinion of the Board of Tax Appeals for the District of Columbia (R. 2-26, 39-44, 235-240, 293-297, 339-343, 377-381) are reported in part at 76 W.L.R. 633.

JURISDICTION.

The judgments of the Court of Appeals in these six cases were entered on May 21, 1949 (R. 484-485). The District's petition for rehearing before the Court of Appeals *en banc* was filed on June 14, 1949, and denied on July 20, 1949 (R. 493-494). The petition for certiorari was filed on October 14, 1949. The jurisdiction of this Court rests on Section 1254, Title 28, U.S.C.

QUESTION PRESENTED.

Whether, as a matter of statutory construction, the respondents are taxable under Section 47-1701, D. C. Code (1940), which imposes a tax of 6% on the gross earnings of "Each national bank . . . and all other incorporated banks and trust companies . . ." in the District of Columbia, or under Section 47-1703, which imposes a tax of 4% on the amount of gross earnings less interest paid to depositors of "Incorporated savings banks . . ." In short, the question is whether respondents are "incorporated banks" within the meaning of Section 47-1701 or "incorporated savings banks" within the meaning of Section 47-1703.

STATUTES INVOLVED.

Paragraph 5 of Section 6 of the Act of July 1, 1902, 32 Stat. 619, as amended, reads in pertinent part, as codified in Section 47-1701, D. C. Code (1940), as follows:

> "§ 47-1701 . . . Each national bank as trustee for its stockholders, through its president or cashier, and all other incorporated banks and trust companies in the District of Columbia, through their presidents or cashiers, . . . shall make affidavit to the board of personal-tax appraisers on or before the 1st day of August each year as to the amount of its . . . gross earnings . . .

for the preceding year ending the 30th day of June, and each national bank and all other incorporated banks and trust companies respectively shall pay to the collector of taxes of the District of Columbia per annum 6 per centum on such gross earnings . . . And in addition thereto the real estate owned by each national or other incorporated bank, and each trust . . . company in the District of Columbia shall be taxed as other real estate in said District . . .."

Paragraph 7 of Section 6 of the Act of July 1, 1902, 32 Stat. 619, as codified in the first paragraph of Section 47-1703, D. C. Code (1940), reads as follows:

"§ 47-1703 . . . Savings banks having no capital stock and paying interest to their depositors shall, through their president or cashier, make affidavit to the board of personal-tax appraisers on or before the 1st day of August in each year as to the amount of their surplus and undivided profits, and shall pay to the Collector of taxes of the District of Columbia a sum equal to one and one-half per centum on the amount of their surplus and undivided profits on the 30th day of June preceding."

Section 2 of the Act of April 28, 1904, 33 Stat. 564, which was amendatory of Paragraph 7 of Section 6 of the Act of July 1, 1904, reads, as codified in the second paragraph of Section 47-1703, D. C. Code (1940), as follows:

"§ 47-1703, * * * Incorporated savings banks paying interest to their depositors shall, through their president or cashier, make report under oath to the board of personal-tax appraisers on or before the 1st day of August in each year as to the amount of their gross earnings, less the amount paid as interest to their depositors for the preceding year ending June 30th, and shall pay thereon to the collector of taxes of the District of Columbia four per centum per annum."

STATEMENT.

Respondents believe that petitioner's Statement of the Case (Pet. 1-8) should be supplemented as follows:

1. Legislative and Administrative Histories of Legislation Involved.

In 1902, Congress enacted the bank tax legislation for the District of Columbia, now known as Sections 1701 and 1703 of Title 47 of the District of Columbia Code, 1940.[2] Under Section 1701, national banks, trust companies and "other incorporated banks" were to be taxed at the rate of six percent upon their gross earnings. Under Section 1703 savings banks having no capital stock and paying interest to their depositors were to be taxed at the rate of one and one-half percent on the amount of their surplus and undivided profits.

In 1902, there were in the District of Columbia national banks, trust companies and certain non-nationally incorporated banks, but no savings banks having no capital stock.[3] The non-nationally incorporated banks did an active commercial business and accepted savings deposits on which they paid interest.[4] The national banks and trust companies did not accept savings deposits.[5]

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[2] Paragraphs 5 and 7 of Section 6 of the Act of July 1, 1902, 32 Stat. 619, set forth above under "Statutes Involved".

[3] Cf. R. 106-107 with R. 116; Rep. Comp. Curr. (1901) XXVII; Rep. Comp. Curr. (1902) XXXII.

[4] R. 44-50, 117-119, 122-123, 217-219. In a committee print of the Senate Committee on the District of Columbia dated May 16, 1902, these non-nationally incorporated banks were classified under the heading, "Savings Banks" (R. 106-107).

[5] Cf. R. 12-13, 186-189, 192-199, 201-205. In 1903 the Comptroller of the Currency refused to express an opinion of the question whether a national bank had the authority to accept savings accounts (R. 153-154). In 1904, it was thought in local banking circles that a national bank did not have authority to accept savings accounts (cf. R. 56). National banks were not expressly authorized to accept "time deposits" until 1913. And it was not until 1927 that national banks were expressly authorized to accept savings accounts. (R. 155.)

In 1904, Section 1703 was amended to provide that incorporated savings banks paying interest to their depositors should be taxed at the rate of four percent upon their gross earnings, less interest paid to their depositors.[6] Prior to amendment of 1904, the national banks and trust companies and non-nationally incorporated banks were all taxed under Section 1701 at the rate of six percent of their gross earnings. Upon the passage of the amendment of 1904,[7] the assessing authority of the District of Columbia discontinued assessing the non-nationally incorporated banks under Section 1701 and assessed them under Section 1703, as amended, at the four percent rate, and continued to so assess them as long as they remained in existence.[8] The assessment of national banks and trust companies under Section 1701 was continued. They have been so assessed up to the present time.

These respondents, each of which operates under a charter granted either by the laws of one of the States or by the laws of the District of Columbia,[8a] started business in the District of Columbia in the years indicated below:

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[6] Section 2 of the Act of April 28, 1904, 33 Stat. 564, set out above under "Statutes Involved".

[7] At the time of the amendment of 1904, there were in the District of Columbia the same three kinds of banks or financial institutions as there had been at the time of the passage of the Act of 1902; namely, (1) national banks; (2) non-nationally incorporated banks and trust companies (R. 115-124). In 1904, as in 1902, the only banks having savings deposits in the District of Columbia were the non-nationally incorporated banks (R. 115-124; Cf. R. 186-189, 192-199, 201-205). Each of the non-nationally incorporated banks were, in 1904, engaging actively in commercial banking as well as savings bank. (R. 10, 44-51, 51-60, 60-64, 74-75, 115-124. A discussion of the 1904 amendment in the Senate Committee on the District of Columbia shows that the amendment was intended to afford relief to the non-nationally incorporated banks (R. 108-114).

[8] R. 168. One of the non-nationally incorporated banks in existence in 1904, the Potomac Savings Bank, did not go out of existence until 1934. (Cf. R. 51 with R. 168).

[8a] Respondent Anacostia National Bank did not secure a national charter until 1946. It is the successor of the Anacostia Bank which, at all times pertinent to these proceedings, operated under a charter granted pursuant to the laws of the State of West Virginia. (R. 339-340)

	Year
Bank of Commerce and Savings	1907
The Security Savings and Commercial Bank	1913
The City Bank of Washington	1906
McLachlen Banking Corporation	*[9]
Anacostia National Bank of Washington	1910
Industrial Bank of Washington, Inc.	1934

These respondents have always done both a savings and commercial business. They have been always assessed under Section 1703 by the taxing authority of the District of Columbia up to and including the fiscal year 1944.

During the period between 1904 and 1944, the Assessor and the Corporation Counsel for the District of Columbia on several occasions considered the nature of the banks subject to taxation as "incorporated savings banks" within the meaning of Section 1703. As late as 1942, they concluded that the provisions of that legislation were applicable to these respondents because they were doing the same type of business as that done by "the savings banks operating in the District at the time of the amendment of April 28, 1904."[10] There was no material change between the business done by these respondents in 1942 and that done by them in 1945.[11]

The evidence before the Board of Tax Appeals showed, among other things, that in 1932, a bill was introduced in Congress by Senator Capper, the Chairman of the Senate Committee on the District of Columbia, to amend Paragraph 5 of Section 6 of the Act of July 1, 1902, now Section 1701 of Title 47 of the present Code. Reports on this bill were prepared, at Senator Capper's request, by

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[9] The McLachlen Banking Corporation was chartered in Virginia in 1891 as the McLachlen and Batchelder Company (R. 312). In 1894, the name of the Company was changed to McLachlen Real Estate and Loan Company (R. 298). It was not until 1907 that the name of the Company was changed to McLachlen Banking Corporation (K. 299).

[10] Cf. R. 72-73 and 257-258 with R. 130-152.

[11] Cf. R. 20-21.

the U. S. Bureau of Efficiency and by officials of the District of Columbia. In these reports, all of the facts concerning the taxation of banks in the District, including the alleged discrimination between the taxation of national banks and incorporated savings banks, were brought fully to the attention of Congress. Congress did not, however, amend the laws relating to the taxation of banks in the District of Columbia (R. 134-150). Furthermore, in 1939, pursuant to an Act of Congress, a complete and searching survey of the tax system of the District was made and a report thereof, commonly known as the "Pond Report,"[12] was submitted to Congress. Bank taxes were discussed in this report.[13] And the attention of Congress was again called to the difference between the taxation of national banks and incorporated savings banks:

> "Originally, incorporated savings banks paid the 6-per cent rate but it was cut to 4 per cent in 1904. National banks and trust companies now do a considerable business in their savings departments, yet are taxed at a higher rate and with no deduction allowed for interest paid to their depositors."[14]

Though the Congress did make extensive changes in the tax system of the District as a result of the "Pond Report", it left standing the provisions of Sections 1701 and 1703 insofar as they provided for taxation of banks in the District of Columbia.

2. Proceedings Before Board of Tax Appeals and Court of Appeals.

In September, 1944, the taxing authority of the District assessed each of these respondents as "incorporated savings banks" under Section 1703 for the fiscal year 1945

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[12] District of Columbia Tax Study: Report pursuant to the Act of May 16, 1938. (House Document No. 108, 76th Cong., 1st Sess.)

[13] *Id.*, pp. 41-42.

[14] *Id.*, p. 42.

(July 1, 1944 through June 30, 1945).[15] The respondents duly paid the assessments thus made against them.[16] Then, shortly after the opinion of the United States Court of Appeals for the District of Columbia in the case of Hamilton National Bank v. District of Columbia, decided June 28, 1946,[17] the taxing authority of the District in October 1946 reassessed the respondents for the fiscal year 1945 as "other incorporated banks" under Section 1701.[18]

The respondents thereupon filed their separate petitions with the Board of Tax Appeals of the District of Columbia appealing from the reassessments.[19] Separate hearings were made on each petition,[20] and the Board of Tax Appeals entered its findings of fact, conclusions of law, and decision separately in each case in favor of the respondents.[21] The Board also entered a memorandum opinion in the course of which it held that respondents, in light of the legislative and administrative histories of the Section 1703, were "incorporated savings banks" within the meaning of that section.[22]

The petitioner filed separate petitions in the United States Court of Appeals for the District of Columbia, seeking to review the decisions of the Board of Tax Appeals.[23] These cases were not consolidated but, for the convenience of the Court of Appeals, were argued at the same time, and were followed by argument in the case of The Citizens' Bank of Washington and then by argument in the case of the Hamilton National Bank. The Court of Appeals ren-

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[15] R. 4, 41, 238, 295, 341, 379.

[16] *Ibid.*

[17] 81 U. S. App. D. C. 200, 156 F. (2) 843.

[18] R. 4-5, 42-43, 238-240, 296-297, 342-343, 380-381. Cf. R. 227, 291, 333, 369, 430.

[19] R. 5, 43, 239, 297, 343, 381.

[20] R. 27-37, 44-92, 240-291, 298-337, 344-369, 382-431.

[21] R. 2-21; 26-27, 39-44, 235-240, 293-298, 339-343, 377-381.

[22] R. 22-26.

[23] R. 1, 39, 235, 293, 339, 371.

dered one opinion covering all of the cases mentioned.[24] But that opinion is clearly divisible in two parts, one having to do with the respondents' cases; the other, with the case of the Hamilton National Bank. This opinion, insofar as these respondents are concerned, unanimously affirmed the decisions of the Board of Tax Appeals of the District of Columbia in favor of the respondents. In ruling in respondents' favor, the Court said (R. 481):

> "As heretofore noted, after the first Hamilton National case was remanded, the Assessor decided there is no bank or trust company in the District of Columbia classifiable as 'an incorporated savings bank paying interest to its depositors.' The Assessor was correct only if a savings bank be thought of in the traditional sense of the term as an institution which confines its business to interest-bearing savings deposits. But, in the light of the legislative history of the 1904 amendment to Sec. 1703, it is not demonstrably true that Congress intended so to restrict the term. A legislative intent not to apply the amendment solely to strictly savings banks is indicated because (a) there were no such savings banks in the District in 1904, and (b) the banks at whose instance the amendment was adopted were engaged in commercial banking as well as in receiving savings deposits.
>
> "The administrative interpretation of the 1904 amendment as applicable to commercial banks with substantial savings departments, which began immediately and has since continued, was therefore not without some statutory basis, or at least was not in the teeth of the amendment. Prolonged administrative construction, if not illegal or unconstitutional, is given great weight in interpreting statutes. In our opinion the Board of Tax Appeals was justified in holding the state-chartered banks to be taxable under Sec. 1703 as incorporated savings banks. The orders of the Board of Tax Appeals in the cases numbered 9834 to 9840, inclusive, are affirmed."

[24] R. 476-483.

GROUNDS OF OPPOSITION TO PETITION.

Respondents oppose the granting of the petition because, contrary to the arguments and assertions of petitioner (Pet. 9-11, 13, 15-20):

1. The Court of Appeals has not decided a question of substance relating to the construction of the Constitution, since no constitutional question is involved in the cases of these respondents.

2. The Court of Appeals has given proper effect to the decisions of this Court applicable to the question decided in the cases of these respondents.

3. The Court of Appeals has not decided an important question of law involving the Constitution, and its decision is not in conflict with its own prior decisions or with the decisions of this Court relating to the power of Congress.

ARGUMENT.

In the petition itself (Pet. 9-10), four reasons are given why a writ of certiorari should be granted. In the initial part of its brief in support of the petition, petitioner has condensed (Pet. 13) these four reasons to three. However, an analysis of the petitioner's argument in support of the petition (Pet. 15), shows that it advances, in substance, only two contentions in support of its prayer for a writ.

Petitioner states its first contention thus (Pet. 17): "It is petitioner's position that non-national banks could be classified for taxation as 'other incorporated banks' and taxed under Section 1701 without doing any violence to the plain language of either 1701 or 1703." This is but the same contention which petitioner urged unsuccessfully before the Board of Tax Appeals and before the Court of Appeals, and which was rejected by both of these tribunals. This contention, it is obvious, presents purely a local question, relating to a municipal ordinance of the District of Columbia, and not one of sufficient importance to invoke this Court's attention.

Petitioner's second contention is that (Pet. 19): "But for the decision of the Court of Appeals that these respondents were properly subject to tax only under Section 1703, there would be no question of 'discrimination' and hence no question of 'due process' or of 'equal protection of the laws'." This contention likewise affords no reason to invoke the jurisdiction of this Court. It may be accurate to state that because the Board of Tax Appeals and the Court of Appeals have held respondents subject to tax only under Section 1703 that a question of discrimination, due process, or equal protection of the laws may arise in other cases involving the taxation of other types of banks, but such a statement has no weight in support of the present petition.

Aside from these two contentions, no argument is advanced in support of the four reasons relied on for allowance of the writ (Pet. 9-10). It is obvious why this is so. *First:* There is no constitutional question involved in the opinion of the Court of Appeals insofar as it applies to the cases of the respondents. *Second:* No decisions of this Court are suggested or discussed which have any bearing upon the opinion of the Court of Appeals insofar as it affects the cases of these respondents. *Third:* No attempt is made by petitioner to support the statement that the question presented in these cases is applicable not only with respect to determining the constitutionality of the particular statutes involved, but also to every statute enacted by the Federal Congress in the exercise of its exclusive jurisdiction to legislate for the District of Columbia. This question might arise under the issue of discrimination in connection with the taxation of other banks, but is not involved in that part of the opinion of the Court of Appeals affecting the cases of the respondents. *Fourth:* There is no question of general importance involved in the cases of the respondents. As stated by the petitioner on page 9 of its petition, the question presented is whether respondents should be taxed at the rate of six percent upon their gross

earnings under Section 1701 as incorporated banks or at the rate of four percent per annum upon their gross earnings, less the amount paid as interest to their depositors under Section 1703. This is not a question of general importance, but purely a local question concerning the gross earnings taxes of the respondents under a statute operative only within the municipal boundaries of the District of Columbia. It is revealing to note that petitioner does not question the substance of the opinion of the Court of Appeals insofar as it applies to the respondents. Strangely enough, it does not seem to question that the legislative and administrative histories of Section 1703 show, as the Court of Appeals held, that respondents are "incorporated savings banks". Petitioner's actual complaint seems to be only that the effect of the decision may require the reclassification of other types of banks.

From the above, it is evident that there are no substantial reasons why the petition for certiorari should be granted. After the decision of the Court of Appeals in the first Hamilton Bank case, the taxing authorities of the District of Columbia sought to eliminate the issue of discrimination by attempting to reassess the respondents as incorporated banks under Section 1701, departing from the procedure which had been followed for forty years. This may have been considered the expedient thing to do, but it could not be supported when questioned before the Board of Tax Appeals. Certainly, the discrimination, if any, could not be lawfully removed by taxing these respondents at a higher rate than that provided by the applicable law. It was plainly an attempt to solve the petitioner's problem in a manner that would meet its difficulty irrespective of its legality. The issue there and before the Court of Appeals, as stated above, was solely under which section the respondents should be taxed. No question of discrimination or constitutionality of the act was asserted. Therefore, when the Court of Appeals affirmed the decisions of the Board of Tax Appeals, the issues, insofar as these respondents are

concerned, were finally settled. The questions of discrimination and the legality of the assessments against national banks under Section 1701 may be involved in that part of the opinion of the Court of Appeals having to do with the case of the Hamilton National Bank, but how that bank should be taxed is not involved in the cases of the respondents. The question of whether a national bank should be taxed as a "national bank" under Section 1701 or as an "incorporated savings bank" under Section 1703, is a matter with which the respondents are not concerned and which cannot be raised in their cases.

Finally, in basing its decision favorable to these respondents upon the legislative history and administrative interpretation, the Court of Appeals gave proper effect to the decisions of this Court, and to its own decisions on the following propositions:

(a) In construing a statute the courts must look to "the history of the times" when it was passed in order to ascertain the reason as well as the meaning of particular provisions in it.[25]

(b) Congress is presumed to know of the long outstanding administrative construction of Sections 47-1701 and 47-1703, and, having failed to amend those acts, that administrative construction has full legislative endorsement;[26] and

(c) The long continued and consistent construction and interpretation of Sections 47-1701 and 47-1703 by the tax-

[25] *United States* v. *Union Pac. R. R. Co.*, 91 U. S. 72, 79. *Rhode Island* v. *Massachusetts*, 12 Pet. 657; *Platt* v. *Union Pac. RR. Co.*, 99 U. S. 48, 64; *Moorehead* v. *New York Ex Rel. Tepaldo*, 298 U. S. 587, 615.

[26] *Crane* v. *Com.*, 331 U. S. 1, 8 and 10; *Helvering* v. *A. J. Reynolds Co.*, 306 U. S. 110, 114, 115; *Helvering* v. *Winmill*, 305 U. S. 79, 83. *United States* v. *Dakota-Montana Oil Co.*, 288 U. S. 459, 466; *Corning Glass Works* v. *Robertson*, 62 App. D. C. 130, 65 F. (2d) 476 (cert. den. 290 U. S. 645); *United States Borax Co.* v. *Ickes*, 68 App. D. C. 399, 409, 98 F. (2d) 271 (cert. den. 306 U. S. 619).

ing authority of the District of Columbia are entitled to great weight and are not to be disturbed, except under unusual circumstances.[27]

CONCLUSION.

The unanimous decision of the Court of Appeals, insofar as it affects these respondents, involves no constitutional, Federal or other question of importance, but merely a question of the correct interpretation of a statute pertaining only to the District of Columbia. The Court of Appeals, in reaching its interpretation of the statute involved, acted consistently with the rules used by this Court in the interpretation of statutes. There is, therefore, no basis for the exercise by this Court of its supervisory powers.

Respectfully submitted,

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[27] *Skidmore* v. *Swift*, 322 U. S. 134; *Logan* v. *Davis*, 230 U. S. 613, 627; *Great Northern Ry. Co.* v. *United States*, 315 U. S. 262, 275; *Norwegian Nitrogen Products Co. v. United States*, 288 U. S. 294, 315; *Billings* v. *Truesdell*, 321 U. S. 543; *Bardwell* v. *Petty*, 52 App. D. C. 310, 312, 286 Fed. 772, 774.